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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1949.

No. 504.

UNITED STATES NATIONAL BANK OF DENVER and HILDRED J. DUNGAN, as Executors of the Estate of George P. Dickey, Deceased, PETITIONERS,

v.

RUBY DICKEY BARTGES, RESPONDENT.

REPLY BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully submit this short brief in reply to the brief in opposition filed in behalf of the Respondent.

COMMENT ON THE "STATEMENT OF THE CASE" IN THE OPPOSING BRIEF

The petition for certiorari clearly presents to this Court a question of law only as to whether the judgment of the Colorado Court fails to give full faith and credit to the findings of fact and the decree of the Kansas Court as required by the Federal Constitution.

The Colorado Trial Court, after considering the voluminous evidence now condensed in the more than 400-page printed Record, found that there was no fraud or duress on the part of Mr. Dickey in connection with the property settlement agreement, but further found, notwithstanding that agreement and notwithstanding the findings of fact and decree of the Kansas Court, that Mrs. Bartges, the former Mrs. Dickey, was entitled to more of the Dickey Estate property than she received under the property settlement agreement solely because, in the Colorado Court's opinion, the amount she received under the property settlement agreement was inequitable in the light of Mr. Dickey's wealth. The Respondent, by her cross-specifications filed in the Colorado Supreme Court (R., pp. 417-420), sought to have the Colorado Supreme Court reverse the Trial Court's findings that there was no fraud or duress in connection with the property settlement agreement, but this the Colorado Supreme Court refused to do and, on the other hand, affirmed the Trial Court's findings and decree with the sole exception that it directed a money judgment to be entered in favor of the Respondent rather than the creation of a new trust such as had been ordered created in the Trial Court's decree.

This being the situation, it is obvious that the evidence upon which the Colorado Trial Court found that there was no fraud or duress on the part of Mr. Dickey is irrelevant and immaterial to the question now presented to this Court as to whether the judgment of the Trial Court, notwithstanding the finding of the Trial Court, affirmed by the Colorado Supreme Court, that there was no fraud or duress, violates the full faith and credit provision of the Federal Constitution.

For some reason, however, opposing counsel have thought it necessary or proper to refer to selected bits of the evidence in the voluminous Record which could only have a bearing upon the factual question of fraud, which has been adversely decided against Respondent, and which is not

before this Court, except as to the nonexistence of any such fraud, and can have no possible relevancy to the full faith and credit question now presented to this Court. In justice to the cause of the Executors of the Dickey Estate and the beneficiaries of that Estate, as well as to Mr. Dickey himself, we cannot accept the underlying picture sought to be presented by opposing counsel without a word of refutation, particularly in view of the findings of the Colorado Court that there was no fraud or duress on the part of Mr. Dickey in connection with the property settlement agreement.

On page 2 of their brief opposing counsel quote or refer to evidence that back in 1926, when the first child of Mr. and Mrs. Dickey was born, he was unable to discharge the medical and hospital bills, and that in the Spring of 1927 friends took up a collection for him to pay his gas, water and light bills and to buy some food, and that Mrs. Dickey then had only two wash dresses. Obviously, such bits of evidence out of the volume of evidence relating to the question of whether there was any fraud connected with the property settlement agreement entered into in 1944 or whether the findings of fact and decree of the Kansas Court is entitled to full faith and credit by the Colorado Courts are immaterial.

Also on page 2 opposing counsel quote part of the sentence from the Trial Court's findings of fact to the effect that Respondent was "a true and faithful wife up until a period shortly before the institution of the divorce action" and then also quote the statement of the Trial Court "that in later years George P. Dickey was an excessive drinker and abusive in his conduct towards his wife". If these particular findings could have any bearing upon the question now presented to the Court, then equally pertinent is the finding of the Colorado Trial Court which counsel has omitted and which connects the two quotations contained on page 2 of the opposing brief and which reads:

"(b) That shortly prior to this time she had be-

come infatuated with one of their employes, a Mr. Bartges, and that she undoubtedly had made an ill-advised trip with him to Colorado which might have resulted in a criminal prosecution;"

On page 4 of the opposing brief counsel state that the balance sheets furnished by Mr. Dickey to the then Mrs. Dickey's counsel preliminary to the property settlement agreement did not identify any specific property owned by Dickey. This certainly is not the fact. The balance sheets which were furnished are attached to the Respondent's complaint which she filed in the Colorado District Court and are shown at pages 17-24 of the Record. The Dickey balance sheet shows everything that Dickey owned, and no contention to the contrary was made either in the pleadings or by way of evidence. Among other items of property which the Dickey balance sheet shows he owned was 80% of the common capital stock of the Dickey Oil Company and none of the 1500 shares of the outstanding preferred stock. It shows that he owned 76 shares out of 150 of another corporation named Geo. P. Dickey, Inc. Then, to Mr. Dickey's balance sheet, were attached balance sheets of these two corporations in which he owned only part of the stock.

Again, on page 4 of the opposing brief, it is stated that the Respondent or her counsel were not given any information regarding the extent and value of the Dickey marital property and that there is an abundance of testimony to show that they did not possess such knowledge. This statement is made notwithstanding the vast amount of contrary evidence, such as the following:

Mrs. Dickey did not personally conduct the settlement negotiations relating to the property settlement agreement, but they were conducted solely in her behalf by her attorney, Mr. Robert C. Foulston, of Wichita, Kansas. Mr. Foulston was admittedly an experienced and able attorney (R., pp. 181, et seq.). Foulston knew that the balance sheets furnished

him by Mr. Dickey were what they purported to be, namely, balance sheets, which showed book values and not actual values. He expressly admitted he was not misled by the balance sheets (R., pp. 249-250). Notwithstanding the statement in the opposing brief that Mrs. Dickey entered into the property settlement agreement upon Mr. Foulston's assumption that Dickey was worth two and a half million dollars, the Record is replete with evidence consisting, to a large extent, of Mr. Foulston's own testimony that he had evidence before him which satisfied him that Dickey was worth much more than that and from five million dollars upwards (R., pp. 199, 201, 203, 210, 216, 217, 221, 226, 239, 240, 241, 250). (The above are references to Foulston's testimony at the trial. Foulston, who was the attorney who negotiated the property settlement agreement for Mrs. Dickey, was practically her sole witness on the fraud issue at the trial of the case.)

It will be noted that the balance sheet of Dickey Oil Company, which was submitted to Foulston (R., p. 24), expressly shows that during the period from July 1, 1943, to November 30, 1943, that company had a profit of $337,531.18, which was at the rate of over $800,000 per year. Foulston was familiar with and recognized the import of this profit showing (R., pp. 250, 251).

When the financial statements or balance sheets were furnished to Mr. Foulston, his accountant and Dickey's accountant considered them, and Foulston's accountant was offered further assistance, if desired, which was never requested (R., p. 340). After the financial statements were furnished Foulston, he never asked Dickey's attorneys for any further information as to Dickey's assets (R., p. 203). Foulston never intended to base he settlement upon a per cent of Dickey's properties (R., p. 223), but numerous things, in addition to Dickey's financial worth, entered into the property settlement, which were testified to at length by Foulston (R., pp. 223, et seq., 323, et seq., 332, et seq.). This was so found by the Trial Court (R., p. 8.).

On page 6 of the opposing brief attention is called to the evidence that more than eight months after the property settlement agreement and the Kansas divorce decree Stanolind Oil and Gas Company purchased all of the stock of Dickey Oil Company for $6,260,000. Reference is not made to the fact, however, that Dickey only owned 80% of the common capital stock of Dickey Oil Company and none of the preferred stock (R., p. 18), and that Dickey's gross share of the proceeds of the sale of the stock of Dickey Oil Company was $4,888,000, and that his net, after expenses of sale and income tax resulting from the sale, was approximately $3,685,000 (R., pp. 351, 352).

Attention in this connection might well be called to a substantial amount of evidence in the case showing that the stock of Dickey Oil Company had tremendously increased in value between February 7, 1944, when the property settlement agreement was entered into and the Kansas decree entered, and the time of the sale of the stock of Dickey Oil Company to Stanolind Oil and Gas Company in the latter part of October 1944. This increase resulted from the finding and development of a new oil pool near Oklahoma City, Oklahoma, known as the West Edmond Pool (R., pp. 257-317).

The above and a vast amount of other evidence is the basis of the Trial Court's finding that there was no fraud or duress on the part of Mr. Dickey in connection with the property settlement agreement or the Kansas divorce and property settlement case.

Mrs. Dickey was admittedly improvident. Her attorney, Foulston, so testified in the present case (R., p. 227), as did Mr. Howard T. Fleeson, one of Mr. Dickey's attorneys in the divorce action (R., pp. 331-333). As a result of this improvidence and to protect her against her own improvidence, Mrs. Dickey created a spendthrift trust for her benefit with $250,000 out of the $325,000 settlement money. Then Mr. Foulston, while on the witness stand in the present case, stated

and testified (R., p. 228) "I agreed with Mr. Fleeson from the beginning on that subject. I agree now that if there is a recovery in this case that that likewise should go into some sort of a trust arrangement so that Mrs. Dickey—Mrs. Bartges now—cannot have it to squander." It was because of such testimony that the Trial Court, finding as it did that, notwithstanding the absence of fraud or coercion, but because of Dickey's wealth, Mrs. Bartges was in equity entitled to more out of the Dickey Estate than she received under the property settlement agreement, concluded to require the additional amount to be allowed her to be placed in a trust for her benefit. This requirement that the additional amount to be allowed Mrs. Bartges should be set up in a trust is the part of the Trial Court's decree which the Colorado Supreme Court reversed.

We again state our regret in feeling it incumbent upon us to thus even briefly refer to the evidence in the case, but, as above stated, we did not feel justified in the interest of our clients in letting stand unrefuted the underlying or background picture attempted to be painted in the opposing brief.

ARGUMENT

I.

The Nature Of The Proceedings And Judgment In the Colorado Courts

The complaint filed in this case (R., pp. 2-34) is based upon the express allegation that Dickey, in order to induce Mrs. Dickey to enter into the property settlement agreement, falsely and fraudulently represented that the financial statement submitted to her accurately reflected the value of his assets and that, in reliance upon such false and fraudulent representations, she entered into the property settlement agreement. She claimed in her complaint that, as a result of these false and fraudulent representations, she was damaged to the extent of two million dollars, and she brought this action *as an action at law* to recover this alleged damage. To her complaint are attached and made a part thereof the find-

ings of fact, judgment and decree of the Kansas Court, the financial statement which she claims was false and fraudulent and the property settlement agreement.

To this complaint was filed a lengthy answer consisting of some thirteen defenses, including a defense denying the fraud and including a defense raising the question of the full faith and credit protection of the Federal Constitution.

A long trial was had, with voluminous evidence, both oral and documentary, introduced.

The Trial Court in due course entered its findings and decree (R., pp. 73-95). It specifically found that Dickey was not guilty of fraud or duress in connection with the property settlement agreement. While not a pleaded issue in the case, the Trial Court's findings conclusively negative any concealment fraud on the part of Dickey in connection with the property settlement agreement. This in itself must necessarily have defeated any action at law for the recovery of damages based upon fraud, whether that fraud be actual or so-called concealment fraud. If there was no fraud, there could be no damages. However, the Trial Court, instead of dismissing the action after so finding, concluded that it was its duty to do equity, or what it considered equity. It held that for a man of Dickey's wealth, whether that wealth be two and a half million dollars, as Foulston indicated at one place in his testimony he thought it was at the time of the property settlement, or approximately six million dollars, as they now contend it was, to give his wife by way of property settlement only $325,000 in cash, plus miscellaneous property, was "niggardly" (R., p. 82) and that this fact alone "stamps the agreement as being inadequate and unfair and he was, therefore, guilty of extrinsic fraud in entering into such an agreement" (R., p. 83). It is thus clear that the so-called "extrinsic fraud" which the Trial Court found to exist consisted only of the alleged inadequacy of the property division, viewed solely in the light of Dickey's wealth and without

taking into consideration the various other elements which Foulston testified and the Trial Court found (R., p. 91) were considered and notwithstanding the fact that the Court had already found that there was no fraud or duress connected with the settlement. The Trial Court then concluded (R., pp. 92, 93) that it was its duty to allow Mrs. Dickey a further amount of the Dickey Estate, which, when coupled with the amount received under the property settlement agreement, would constitute what the Colorado Trial Court thought would be a fair and equitable division of the property (R., p. 91, 93). The Trial Court then proceeded to require the creation of a new trust under which Mrs. Dickey would get $450 per month in addition to the $550 per month she is already receiving out of the trust created with the moneys received from the property division (R., p. 93, 94).

The above is the nature of the action and the nature of the findings of fact and judgment entered by the Trial Court.

Being of the opinion that the Trial Court was in error in allowing a further property division to Mrs. Bartges, the former Mrs. Dickey, after finding that there was no fraud or duress connected with the property settlement agreement, and in view of the findings of fact and decree of the Kansas Court, Petitioners, as Executors of the Dickey Estate, took the case to the Colorado Supreme Court.

Likewise, Mrs. Bartges took the case to the Colorado Supreme Court, assigning various alleged errors, including the action of the Trial Court in tying up any relief granted in the form of a trust, and also attacking the finding of the Trial Court that Dickey was not guilty of fraud or duress.

The Colorado Supreme Court (R., p. 20) affirmed the findings of the Trial Court and reversed the judgment of the Trial Court only to the extent of requiring a money judgment instead of the creation of a trust fund to cover the additional allowance to be made Mrs. Dickey. As will be

seen from the opinion of the Colorado Supreme Court, this affirmance is grounded upon the existence of so-called "extrinsic fraud" which consisted only of the inadequacy of the property division in view of Dickey's wealth, even though the property division was not tainted by fraud, duress or coercion. The Colorado Supreme Court reversed with directions (R., p. 444) to the Trial Court "to enter a money judgment for such sum as shall be determined by the court, from the evidence heard upon the trial, as will result in a fair and equitable division of property as required under Kansas law". Clearly, again, notwithstanding the name it may be called, this is not a judgment for damages based upon fraud, because fraud is nonexistent as found by the Trial Court. It is an order for a judgment requiring a further division of property and that is all. As the Colorado case was originally filed, it might be considered as having constituted an action at law for damages based upon fraud. As it ended, however, it is merely an action for property division as between a former husband and wife, notwithstanding a property settlement agreement between them, untainted by fraud, duress or coercion, which, under the Kansas decisions, as admitted by opposing counsel on pages 14 and 15 of their brief, would be binding and conclusive upon the Kansas Courts. The Colorado Supreme Court recognized this to be the Kansas law (R., pp. 430-433) in its references to and quotations from *Petty v. Petty*, 147 Kan. 342, 76 P. (2d) 850; *Hyde v. Hyde*, 143 Kan. 660, 56 P. (2d) 437; Id., 147 Kan. 134, 75 P. (2d) 1023; and other cases therein cited.

II.

The Nature Of The Proceedings In And Findings Of Fact And Decree Of The Kansas Court

In her petition against Mr. Dickey, filed October 27, 1943, in the District Court of Sedgwick County, Kansas, (Abstract of Exhibits, pp. 12-15) Mrs. Dickey set forth alleged grounds for divorce and also alleged that during the marital period the parties had accumulated a large amount

of property, most of which stood in Mr. Dickey's name. She prayed for a divorce and for a property division.

Mr. Dickey filed an answer and cross-petition for divorce (Abstract of Exhibits, pp. 17-20). Mrs. Dickey, through her attorneys, filed a "Motion for Property Statement" (Abstract of Exhibits, p. 20). It was after this that the financial statement hereinabove referred to was furnished by Mr. Dickey to Mrs. Dickey through their respective attorneys.

Then on February 7, 1944, the property settlement agreement (R., p. 25) was entered into between Mr. and Mrs. Dickey. At the same time Mrs. Dickey created the spendthrift trust with $250,000 out of the $325,000 cash received in the property division (R., pp. 179-180). A hearing was thereupon had before the Kansas Court and it entered its findings of fact and decree, copy of which is attached to the complaint filed in the Colorado action and made a part thereof (R., pp. 9-17). These findings of fact and decree were approved and consented to by both Mr. and Mrs. Dickey through their respective attorneys (R., p. 17). That this was a consent decree is admitted in the opposing brief. Mrs. Dickey herself was present in the Kansas Court at the hearing and testified. In the Colorado trial her attorney, Foulston, testified to the effect that the Kansas Court asked Mrs. Dickey if she understood the contract and she said she did (R., pp. 179-180).

The Kansas Court then found (R., p. 10) that the property settlement agreement

> "* * * was by the parties submitted to the court for consideration of the court, and the court, being duly advised in the premises, finds that said property settlement, under the circumstances, is a fair and equitable division of the properties accumulated by the parties during said marriage and that the same should be approved by the court."

The Kansas Court then decreed (R., p. 13)

> "Second: That the property settlement made between the parties hereto be, and the same is hereby, approved by the court, and that said division of property and the settlement of their mutual rights is fair, reasonable and equitable under all the circumstances, and that the court makes no order for the payment of any alimony to the plaintiff in this case."

The Kansas Court further decreed (R., p. 16)

> "Seventh: It is further ordered by the court that each of the parties hereto be, and they each are hereby, permanently and perpetually enjoined from claiming or asserting any right, title or interest in and to the property of the other as the same is established by the property settlement of the parties, or in and to any property which either party may hereafter acquire by purchase, gift, descent, or otherwise."

Respondent's counsel say that all the Kansas Court did was to "approve" the property settlement agreement. Upon this premise they argue that the property settlement agreement was not merged in the findings of fact and decree of the Kansas Court. The Kansas Court's findings of fact and decree, however, go much further than a mere approval of the property settlement agreement. The Kansas Court made a specific finding that the property division evidenced by the property settlement agreement was fair, reasonable and equitable, and it so decreed. As we pointed out in our opening brief (pp. 36-39), the Kansas Supreme Court in *Petty v. Petty*, 207 P. (2d) 428, 167 Kan. 510, and *Hullet v. Hullet*, 133 Kan. 738, 3 P. (2d) 470, has distinguished between findings and decree which merely "approve" a property settlement agreement and findings and decree in which the Court finds that the contract submitted to the Court constitutes a fair and equitable division. Where such finding is contained

in the decree, then, as the Kansas Supreme Court held in *Hullet v. Hullet*, "By such order the court clearly spelled out the terms of the contract in its judgment decree". So in this Dickey case the Kansas Court has in its decree spelled out the terms of the Dickey property settlement agreement by its findings and decree that the division of property evidenced thereby, under all the circumstances, was fair, reasonable and equitable. It is this finding and this decree that the property division was fair, reasonable and equitable rather than the mere "approval" of the property settlement agreement which we submit constitutes an adjudication by the Kansas Court as to the fairness, reasonableness and equity of the property settlement agreement.

Opposing counsel state that the Colorado action is a different action than the Kansas action. We have answered this above. In both was sought a division of property and the relief granted by both is a division of property.

Opposing counsel state there was no issue of fraud, duress or concealment tendered in the Kansas proceedings. It will be kept in mind, however, that the Colorado Court has held that there was no such fraud, duress or concealment. Absent any such fraud, duress or concealment, then, as pointed out by the Colorado Supreme Court in its opinion (R., pp. 430-432), the Kansas Court was duty bound to approve the property division. On the other hand, if there was fraud or duress connected with the property settlement agreement, then, under the Kansas decisions relied upon, the Kansas Court was not bound to approve the property settlement agreement and those fraud issues could have been submitted to the Kansas Court. Under the Kansas decisions, a judgment is res judicata, not only as to matters actually decided, but also as to matters which could have been submited to and decided by the Court. This rule has been held particularly applicable to property division and alimony in connection with divorce proceedings.

The basic law in Kansas announcing this principle is *Roe v. Roe*, 52 Kan. 724, 35 P. 808, decided in 1894, and which has been cited and approved in numerous cases since that time. We quote from the Pacific report, page 809:

> "Under the law of Kansas the court rendering judgment in an action for divorce is authorized, on a proper showing, to grant alimony, whether the divorce be allowed or not. If the divorce is granted, it operates as an absolute dissolution of the marriage tie. Whatever orders with reference to alimony *or a division of the property* are desired by either party may then be considered and determined by the court. *If they may be so considered and determined, and a party neglects to require such determination, the judgment is as full and complete a bar as if the question had been tried and determined.*" (Emphasis supplied)

The principle announced in the *Roe* case has been followed in a long line of Kansas decisions. *Zellner v. Zellner*, 155 Kan. 530, 127 P. (2d) 428; *Calkins v. Calkins*, 155 Kan. 43, 122 P. (2d) 750; *McCormick v. McCormick*, 82 Kan. 31, 107 P. 546; *Roberts v. Fagan*, 76 Kan. 536, 92 P. 559; *Pinkerton v. Pinkerton*, 122 Kan. 131, 251 P. 416; *Fusselman v. Fusselman*, 122 Kan. 515, 253 P. 411; *Heivly v. Miller*, 102 Kan. 313, 169 P. 1141; *Mayfield v. Gray*, 138 Kan. 156, 23 P. (2d) 498; *Boyles v. Emery*, 159 Kan. 300, 153 P. (2d) 936; *Elliott v. Elliott*, 154 Kan. 145, 114 P. (2d) 823; *Raney v. Matney*, 128 Kan. 426, 278 P. 26; *Putnam v. Putnam*, 104 Kan. 47, 177 P. 838.

For the various reasons above refuted, counsel for Respondent contend that, once the property division was entered into between Mr. and Mrs. Dickey, the Kansas Court lost jurisdiction of the property division issue or question tendered to it by the petition filed in that case, and from this they argue that the findings of fact and decree of the Kansas Court, notwithstanding that they purport to find the

property division to be fair and equitable and so decree and also enjoin the parties from asserting any rights against the other contrary to the property settlement agreement, is void and nugatory because beyond the jurisdiction of the Court. We feel that we have fully answered this contention above, but there is one further complete and conclusive answer which we have suggested in our opening brief (pp. 40, et seq.), but which is given only nodding attention on page 17 of the opposing brief. This point is that the Kansas decree is admittedly a "consent decree". It does contain the findings and the decree above quoted to the effect that the property division evidenced by the property settlement agreement was fair, reasonable and equitable. It does contain the injunction quoted above enjoining both Mr. and Mrs. Dickey from asserting any rights in the property of the other inconsistent with the property settlement agreement. These provisions were inserted in the Kansas findings of fact and decree by consent of the parties. The Kansas Supreme Court in a number of decisions, both old and recent, has decided that consent decrees are binding upon the parties. This covers situations where, in the absence of the consent, the Court rendering the decree would not have jurisdiction to enter the particular decree. The Kansas authorities so holding are cited and quoted from on pages 40-43 of our opening brief. The Kansas decree, being a consent decree, is res judicata as to the matters covered thereby, irrespective of the jurisdiction of the Court to enter it in the absence of such consent.

III.

Full Faith And Credit Has Been Denied

Respondent's position, sustained by the Colorado Supreme Court, is that, under the Kansas law, a wife at the time of a divorce is entitled to a fair and equitable property division; that in the instant case Mrs. Dickey, now Mrs. Bartges, did not get such a fair and equitable division under the property settlement agreement because of the inade-

quacy of the amount received in comparison to Mr. Dickey's wealth and, therefore, it is claimed to follow that, even though there was no fraud or duress in connection with the property settlement agreement, the Colorado Court has the right to give Respondent such an additional amount of the Dickey Estate property as, when added to the amount received under the property settlement agreement, will constitute a fair and equitable division. It is contended and has been held by the Colorado Supreme Court that neither the property settlement agreement itself nor the Kansas decree bars such relief, and it is this relief which the Colorado Supreme Court has ordered granted.

Petitioners contend that such relief must necessarily fail to give the full faith and credit to the findings of fact and decree of the Kansas Court required by the Federal Constitution. To us this seems obvious. Concededly the test of full faith and credit is that the Courts of one State must give the same effect to the judgments and decrees of the Courts of other States as are given them in the State where rendered. Applying this principle to the instant case, the following appears:

(a) The Kansas Court did find and decree as a matter of fact that the property division evidenced by the property settlement agreement was fair, reasonable and equitable. It did enjoin the parties from asserting any rights in the property of the other inconsistent with the property settlement agreement. Such a finding and such a decree is binding on the parties and res judicata under the Kansas laws. The Kansas decree more than "approved" the property settlement agreement. It found and decreed facts, and, under the Kansas Supreme Court decisions, supra, this spelled out the contract in the decree and made the property division so spelled out a part of the decree, and this is what the Kansas Court has held constitutes a binding and res judicata decree. For the Colorado Courts to now be permitted to

find that the property division was not fair, reasonable and equitable is to permit them to do something that could not be done by the Kansas Court.

(b) It is no answer to say that the effect of the execution of the property settlement agreement was to withdraw the property division question from the jurisdiction of the Kansas Court. This argument destroys itself, as we see it. Under the Kansas decisions referred to supra and cited by opposing counsel, as well as by the Colorado Supreme Court, the Kansas Court is duty bound to approve a property division agreement if it is free of fraud and is equitable. It is not so bound if it is not free of fraud or is not equitable. If the Kansas Court was bound to approve the Dickey property settlement agreement, it must have been because it was free of fraud and equitable. This would destroy the basis of the cause of action attempted to be asserted in Colorado. On the other hand, if the property settlement agreement was not free of fraud and equitable, then the Kansas Court was not bound to approve it and could not be said to have lost jurisdiction over property division.

(c) The effect of the Colorado Supreme Court ruling is that, in all instances, a wife in connection with a divorce is entitled to a fair and equitable property division. This is contrary to the Kansas law, for the Kansas decisions referred to supra hold that, while the Kansas divorce court has jurisdiction of property division, a wife is barred on res judicata principles from receiving a property division if she does not assert that right in the divorce proceedings. If it could be assumed, therefore, that the Kansas decree did not affirmatively adjudicate property division, nevertheless, that decree would be res judicata on property division in any other Kansas Court and would bar the Respondent from claiming a property division in any other Kansas Court.

(d) Finally, as we have pointed out above, the Kansas decree was a "consent decree". It does, we submit, affirma-

tively find and decree that the property division evidenced by the property settlement agreement was fair, reasonable and equitable. Being such a consent decree, then, under the Kansas law, it is res judicata and binding upon the parties thereto as to its property division provisions the same as its other provisions, irrespective of whether, in the absence of such consent, the Kansas Court would have had jurisdiction to adjudicate the property division.

Notwithstanding that the Respondent could get no relief in Kansas because of the res judicata effect there of the Kansas decree, the Colorado Court has given her such relief here and has expressly found the Kansas decree to be no bar to relief in Colorado. We have, therefore, a situation where there was a divorce action in Kansas in which the issue of property division was tendered. This was followed by a property settlement agreement which the Colorado Court has found to be free from fraud or duress. It was followed by a decree entered by the Kansas Court, consented to by both parties, in which the property division evidenced by the agreement itself was found to be fair, reasonable and equitable and the parties were enjoined from asserting any rights contrary thereto. Notwithstanding all of the above, including the injunction in the Kansas decree, the Colorado Court proposes to permit the Respondent to secure an additional part of the Dickey Estate property because of its finding that the amount she received under the property settlement agreement was not a fair and equitable division of the property, solely in view of Mr. Dickey's wealth.

We submit that it is clear that any such relief must necessarily fail to give the full faith and credit to the Kansas decree required by the Federal Constitution.

IV.

The Finality Of The Judgment

A substantial portion of the opposition brief is in support of Respondent's position that the judgment to which

this writ of certiorari is sought does not have such finality as would justify certiorari. We believe it will serve no useful purpose to analyze the various decisions cited in Respondent's brief. A most recent analysis of what constitutes finality for certiorari purposes is contained in the opinion of this Court in *Republic Natural Gas Co. v. State of Oklahoma*, 334 U. S. 62, 92 L. Ed. 1212. Page references now made are to the Law Edition report.

In that case this Court said:

> "No self-enforcing formula defining when a judgment is 'final' can be devised. Tests have been indicated which are helpful in giving direction and emphasis to decision from case to case. Thus, the requirement of finality has not been met merely because the major issues in a case have been decided and only a few loose ends remain to be tied up—for example, where liability has been determined, and all that needs to be adjudicated is the amount of damages. (Citing cases)
>
> "On the other hand, if nothing more than a ministerial act remains to be done, such as the entry of a judgment upon a mandate, the decree is regarded as concluding the case and is immediately reviewable. * * *." (page 1219)

Quoting Syllabus 10 (page 1214):

> "10. The possibility that matters left open by a state court's judgment may generate additional constitutional questions requires a finding that the finality essential to a review of such judgment by the Supreme Court of the United States does not exist."

Quoting also from the dissenting opinion (pages 1225 and 1227):

> " * * *. But not every decision by a state court of last resort leaving the controversy open to further

proceedings and orders is either inconclusive of the issues or premature for purposes of review under sec. 237. * * *." (page 1225)

"This case therefore is one in which the need for further proceedings may never arise and almost certainly would not do so if the constitutional question were now determined. * * *." (page 1227)

In the instant case the full faith and credit constitutional question has been "finally" decided. There is no chance, as there was in the *Republic Natural Gas Company* case, that additional federal questions can be raised. A ruling by this Court that the full faith and credit requirement of the Federal Constitution has been violated would end the case.

Furthermore, there is really nothing except a ministerial act to be performed by the Trial Court pursuant to the Supreme Court remand. The Trial Court found that the property settlement agreement did not evidence a fair and equitable division of the property involved and that to give Mrs. Dickey, now Mrs. Bartges, an equitable property division would require her to receive an additional $450 per month over and above the $550 per month which she is now receiving as a result of the property settlement agreement. In order that Respondent might secure this additional $450 per month, the Executors of the Dickey Estate were ordered by the Trial Court to create a trust out of which she would receive this monthly sum. The Colorado Supreme Court has affirmed the Trial Court, with the exception that the Trial Court is required to enter a money judgment instead of requiring the creation of a trust. The amount of this money judgment, under the Colorado Supreme Court opinion, is to be determined by the Trial Court "from the evidence heard upon the trial" and is to be such amount as will result in a fair and equitable division of the property as required under Kansas law. No new evidence is to be permitted. The amount is to be based upon the evidence heretofore introduced

and, as above stated, is to constitute a fair and equitable division of the property as required by the Kansas law. The Trial Court has already found what that fair and equitable division is, namely, an amount which will produce to Respondent an additional $450 per month. It is a mere ministerial and mathematical act to determine that amount.

For all of these reasons we respectfully submit that this record presents a judgment with the character of finality necessary to give certiorari jurisdiction to this Court.

Respectfully submitted,

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